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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1970

No. 687

MORRIS I. COHEN,
Petitioner

v.

JAMES T. NEAGLE,

INDIANA BELL TELEPHONE COMPANY INCORPORATED,

CHARLES H. BOSWELL,
Respondents

PETITION FOR WRIT OF CERTICRARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM 1970

MORRIS I. COHEN,

Petitioner

v.

JAMES T. NEAGLE,

INDIANA BELL TELEPHONE COMPANY, INCORPORATED,

CHARLES H. BOSWELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MORRIS I. COHEN, petitioner, prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on April 21, 1970, dismissing the appeal on motion of de-

fendants-appellees without a hearing, and denying petitioner's motion to set aside affirming its order of April 21, 1970, on June 25, 1970. See Appendix A.

JURISDICTION ON WRIT OF WRIT OF CERTIORARI

Petitioner is basing his petition for writ of certiorari on the following considerations as delineated in Rule 19 of the United States Supreme Court rules as follows:

1. The United States Court of Appeals for the Seventh Circuit has decided the subject causes of action in conflict with the decisions of another court on the same matter.

2. Has decided a federal question in conflict with applicable decisions of the Supreme Court and has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision.

There were no official or unofficial reports of opinions delivered in the United States District Court for the Southern District of Indiana, where

both causes of action originated, or in the United States Court of Appeals for the Seventh Circuit where the appeal was denied.

The official transcript of record will indicate that the United States District Court dismissed the action on the basis of an oral conditional motion by petitioner in a pre-trial conference which contained many errors and will be discussed, infra, under specification of errors. The appeal was dismissed by the United States Court of Appeals for the Seventh Circuit on motion of defendants-appellees without a hearing and, over petitioner's objections to such procedure. There was no petition for a rehearing because the petitioner was never granted a hearing, but did move for a hearing which was denied by the Court. Petitioner herewith includes all of the issues raised in his brief to the United States Court of Appeals for the Seventh Circuit as part of this petition for writ of certiorari. The statutory provision granting the Supreme Court of the United States jurisdiction is Title 28 U.S.C.A. Section 2101(c).

SPECIFICATION OF ERRORS

United States District Court

1. Appearance of attorney Nisenbaum without approval of petitioner and without filing an appearance as required in Rule 5 of the Fed. Rules of Civ. Proc. and illegal search under the Fourth Amendment to the Constitution of the United States.

2. Petitioner's oral motion to dismisss was contrary to Rule 7(b) of the Federal Rules because it was not in writing. Rule 11 of the Fed. Rules of Civ. Proc. also provides for motions to be in writing.

3. Rule 16 of the Federal Rules delineating procedures for pre-trial conferences was used as a vehicle to dismiss the two cases instead of preparing them for a hearing in the case of a petition of mandamus and for trial in the other case.

4. Failure to confront petitioner with allegations of unauthorized counsel, Nathan Nisenbaum, to the Court.

5. Failure of the Court to rule on peti-

tioner's motion for disqualification, under Title 28 U.S.C.A. Section 144 prior to the pre-trial conference.

6. The Court's allegation of petitioner's mental incompetency which was not in issue in the cases as required under Rule 35 of the Fed. Rules of Civ. Proc.

7. Failure of the Court to rule on motions for summary judgment under Rule 56 of the Fed. Rules of Civ. Proc.

8. Denial of petitioner's right to trial by jury under the Seventh Amendment to the Constitution of the United States which was on motion before the Court, and had not been ruled on by the Court. The original complaint and amended complaint also contained a request for injunction which had not been acted upon by the Court.

Errors--United States Appellate Court for the Seventh Circuit

1. The Fed. Rules of App. Proc. do not grant authority to United States Appellate Courts to grant a motion for dismissal by appellees except on failure to file a brief. Such motion was granted by

aforesaid Court.

2. The denial of a hearing on appeal which has been filed as of right constitutes denial of procedural and substantive due process under the Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

United States District Court

1. Was it proper for the District Court to impose a condition precedent of requiring a mental examination of petitioner before he could represent himself pro se?

2. Was it mandatory for the District Court to rule on petitioner's motion for recusa tion before the pre-trial conference?

3. Was petitioner entitled to an evidentiary hearing and trial based on his motion for jury trial, and was it a denial of the right of trial by jury as delineated under the Seventh Amendment to the Constitution of the United States?

4. Was it necessary to provide for a written motion signed by petitioner before dismissal by the Court on petitioner's conditional oral motion to

dismiss?

5. Was the appearance of Nathan Nisenbaum, attorney, without authority of petitioner at the pre-trial conference a negation of procedural and substantive due process as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States?

6. Was it proper for the Court to dismiss both causes of action while it had motions for summary judgment before it in both cases filed, and can it be inferred that the Court was biased and prejudiced from such conduct?

United States Appellate Court for the Seventh Circuit

1. Did the United States Court of Appeals exceed its jurisdictional power by granting defendant-appellees motion to dismiss without a hearing?

2. Was there a denial of procedural and substantive due process in the Appellate Court's denial of a hearing and therefore illegal?

3. Can it be inferred from the fact that a deposition taken under a subpoena duces tecum in a federal case as required by the Federal Rules, and

which was defamatory to petitioner as a former employee of the United States Department of Labor, Wage & Hour Division, and as a practicing attorney, was pre-conceived by employees of aforesaid Governmental agency to defame petitioner by tendering an incomplete report and by publication of aforesaid deposition without signature and without filing?

4. Was the presence of Mr. Nisenbaum, brother-in-law of petitioner, proof of the invasion of petitioner's right of privacy with regard to family relationships at the pre-trial conference without authority of petitioner?

CONSTITUTIONAL PROVISIONS STATUTES AND RULES OF COURT INVOLVED

The petition for writ of certiorari involves the Fourth, Fifth, and Seventh Amendments to the Constitution of the United States. It also involves Federal Statutes under the Fed. Rules of Civ. Proc. In addition it also involves the Indiana Constitution and Indiana statutes with regard to the Erie Tompkins doctrine. Petitioner's appellate brief covers all of the foregoing except the Federal Rules of Appellate Procedure which is covered in this petition.

STATEMENT OF THE CASE

The statement of the case will be substantially the same as stated in petitioner's brief to the United States Court of Appeals for the Seventh Circuit bringing it up to date with regard to proceedings in the foregoing Court.

Petitioner filed a complaint for damages due to the invasion of his right to privacy by reason of telephone being wiretapped by respondent, Neagle, in August 1967. James T. Neagle is the agent in charge of the Indianapolis office of the Federal Bureau of Investigation in the Department of Justice. Subsequently petitioner filed a motion for joinder of Indiana Bell Telephone Company, Incorporated, which was granted by the Court under Rule 20 of the Fed. Rules of Civ. Procedure. The complaint alleged that there was interception of petitioner's telephone by respondents Neagle and Bell and also requested an injunction which was never acted upon by the Court. After petitioner had joined respondent Bell, a motion for a preliminary injunction was filed with regard to respondent Bell.

After waiting for six months for the Court to take action, petitioner filed a motion for withdrawal of aforesaid motion for preliminary injunction and hearing for said injunction against respondent Bell and filed a motion for a jury trial. This was never acted upon by the Court. Petitioner filed a motion to set case for trial in November 1968. Petitioner then filed a motion for recusation of Judge S. Hugh Dillin and appointment of another judge because of bias and prejudice not based on court rulings. No action was taken on this motion by the Court. The date of filing was September 12, 1969. On October 4, 1969, petitioner received an order to appear for a pre-trial conference issued by the Court on October 3, 1969. The names of petitioner and attorneys of record, Richard O. Creedon and the United States attorney, were on this order. The date set for the conference was October 22, 1969, at 9:30 a.m.

On October 21, 1969, petitioner received a telephone call from Richard O. Creedon, attorney for respondent Bell, about the pre-trial conference

with regard to exchanging a list of witnesses over the telephone before the conference and about any stipulations that would be involved. Petitioner informed Mr. Creedon that he would give him the list of witnesses next day at the conference and that he had nothing to stipulate. Mr. Creedon was persistent, but his request for witnesses was refused. Mr. Creedon also indicated that he had some witnesses, but petitioner evinced no interest in his list.

Petitioner arrived in the offices of Judge S. Hugh Dillin at 9:20 a.m. the morning of October 22, 1969. Petitioner was the first to arrive. The judge's secretary advised petitioner to wait because the judge had not yet arrived. Subsequently Mr. Creedon, attorney for Bell, and Charles H. Scruggs, assistant United States attorney, arrived at which time Mr. Creedon handed a motion for summary judgment and his list of witnesses to petitioner stating that he had already filed the motion and given a copy of it to the United States attorney's office, and was handing it to the petitioner rather than mailing it to him. He also

tendered at this time affidavits with the copy of motion for summary judgment from employees of respondent Bell. Mr. Scruggs, assistant United States attorney, handed petitioner one name whom he considered his witness, James T. Neagle. Petitioner gave both attorneys his list of witnesses.

With regard to the case involving a petition for writ of mandamus, Charles G. Brattain, who was then assistant United States Attorney, filed a motion for summary judgment on July 1, 1968. Petitioner objected to motion for summary judgment because attorney for Boswell, Mr. Brattain, did not file a supporting brief as provided for in Rule 7(a) of the United States District Court for Southern Indiana, and because a petition for writ of mandamust does not fall within the categories of Rule 56 of the Fed. Rules of Civ. Proc. for summary judgment. The motion for summary judgment in this petition had not been acted upon up to and including the day of the pre-trial conference on October 22, 1969.

At 9:30 a.m. of October 22, 1969, Mr. Nathan

Nisenbaum, attorney, arrived in the anteroom of judge Dillin's offices. Petitioner asked him what he was doing here, and Mr. Nisenbaum, who had been dismissed from petitioner's services more than two months previously, stated that the judge wanted to see him. He was admitted to the judge's chambers and was alone with the judge for 15 minutes.

The judge's secretary then informed petitioner and attorneys for respondents that the judge was ready for the conference. Mr. Nisenbaum was sitting in the judge's chambers when aforementioned attorneys for respondents and petitioner entered. Petitioner introduced himself as did attorneys for respondents.

Judge Dillin opened the conference by stating that this was a pro se case and on the basis of the conversation he had with Mr. Nisenbaum (he mispronounced his name using the short i as in eat rather than the long i as in eye) petitioner's brother-in-law, as to what transpired in his office that petitioner was mentally incompetent to continue with the case and unless he consented to a psychiatric examination, he would appoint a guardian ad litem to continue with

— the case.

Petitioner stated that he had just been examined by two different doctors of the Veterans Administration in 1967 and they considered petitioner normal in every respect particularly when they learned that he had just graduated from the Indiana University School of Law and passed the bar examination for the State of Indiana and was admitted to the Bar in May 1967.

Petitioner then stated that the Federal Bureau of Investigation had embarked upon a program of character assassination of petitioner by identifying him as a communist. Judge Dillin stated that it was no crime to be a communist. Petitioner stated that respondent Neagle's agents had been tampering with his automobile. Judge Dillin remarked that we are not experts in the mechanics of a car. Petitioner also asserted that his family life had been interfered with by turning his two sons into informers for respondent Neagle. Judge Dillin replied that a son could not very well tell his father that he was mentally incompetent. Petitioner stated that his

son did not deny the charge of informing, and that he did not have that excuse and he also acted guilty.

Noting that judge Dillin could not be dissuaded from his original position as to petitioner's being mentally incompetent, i.e. non compos mentis, he stated that he would drop the cases if respondents' attorneys would agree to discontinue their harassment and invasion of petitioner's right to privacy. Attorneys Creedon and Scruggs nodded their heads. Judge Dillin stated that a stipulation would not be necessary. Attorney Nisenbaum asked petitioner if he still had the stipulation and petitioner replied no. The door to the judge's chambers was wide open during the entire conference. Two persons, apparently from the clerk's office, were sitting on a bench near an open door during the entire conference. Mr. Nisenbaum was involved in the conference during the entire proceeding and stayed and participated until it was over. Mr. Nisenbaum was more vocal than either of the attorneys for respondents, both of whom said nothing during the entire pre-trial conference. The only reference to the petition for

writ of mandamus action No. 68-C-70 in which there was a motion for summary judgment pending, was the holding of the list of cases pending by Judge Dillin, who stated that the cases were old.

Later that afternoon petitioner called judge Dillin in his office and the judge stated that it would be advisable for petitioner to see the man from Muncie (he was referring to Morris Saperstein, M.D., a practicing psychiatrist in Indianapolis who petitioner knew in Muncie, Indiana,) even though petitioner had been twice examined by the Veterans Administration in 1967. Petitioner also asked judge Dillin if the conduct of a person was not indicative of his mental competency. He stated that it was still advisable to get a psychiatric examination on the basis of what he had learned from petitioner's brother-in-law. Note: Petitioner called his brother-in-law and asked him what he had said to judge Dillin and he refused to do so. On October 23, 1969, the day after the pre-trial conference, petitioner received the court's order for dismissal by oral motion in the United States mail.

Petitioner objected and took exception to the presence of Mr. Nisenbaum at the pre-trial conference without filing an appearance, and subsequently submitted an account of the pre-trial conference because there was no stenographic record taken of the conference. Attorneys for respondents, namely, Creedon and Scruggs, were sent copies of the foregoing account in accordance with Federal Rules of Civil Procedure.

After the allowable time, petitioner filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. The clerk of the District Court waited the full 60 days before sending in the record.

Petitioner then filed his brief. Attorney for respondents Neagle and Boswell filed a motion to dismiss which was granted by the Court of Appeals. Petitioner objected thereto alleging that it was a denial of due process and contravened the "fairness" doctrine. The United States Court of Appeals for the Seventh Circuit granted respondents" motion of dismissal without a hearing.

Petitioner filed a motion to set aside the Court's judgment and be granted a hearing alleging that the Court exceeded its statutory jurisdiction by granting a motion to dismiss because it was granted without a hearing. There is no authority in the Federal Rules of Appellate Procedure whereby a respondent could move for dismissal without a hearing unless petitioner failed to file a brief, which had been accomplished.

Respondents by order of the Court objected to petitioner's motion to set aside and be granted a hearing in defense of their motion and petitioner's motion was denied on June 25, 1970.

Respondent Neagle's counsel based his pleading for overruling of petitioner's motion on redundant logic by stating that because the cases had been dismissed that it could not be appealed. The same could be said of respondents' allegation of mootness. Respondents' counsel also refers to Rule 27 of the Federal Rules of Appellate Procedure which have to do with "adjective law" and not to substantive law which affects appeal on the merits. Based on the,

pleadings of both attorneys who were ordered to respond to petitioner's motion to set aside and be granted a hearing, the court denied petitioner's motion. The Court took petitioner's motion as a motion to reconsider.

ALLEGATION OF JURISDICTION IN LOWER COURT

Jurisdiction in the United States District Court for the Southern District of Indiana is based on a federal question, which involves the invasion of privacy by contravening the Fourth Amendment to the Constitution of the United States, The Fifth Amendment, The Federal Communications Act of 1934, Title 47 U.S.C. Section 605; the Federal Tort Claims Act of 1946; Title 28 U.S.C.A. Section 410; and diversity of citizenship of respondent Bell who was later joined in the action. The amount in controversy was alleged to exceed $10,000.00.

REASON FOR GRANTING WRIT

In conformity with Rule 19 of the United States Supreme Court petitioner submits the reasons for granting the writ as follows:

1. The United States Court of Appeals for the

Seventh Circuit has decided a federal question which is in conflict with applicable decisions of the United States Supreme Court.

2. The United States Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned a departure by the United States District Court for the Southern District of Indiana so as to call for an exercise of the United States Supreme Court's power of supervision.

3. The United States Court of Appeals for the Seventh Circuit has decided this case which is in conflict with the United States Appellate Courts in the different circuits.

ARGUMENT FOR ALLOWANCE OF THE WRIT

THE APPEARANCE AND PARTICIPATION OF NATHAN NISENBAUM BY THE DISTRICT COURT CONTRAVENED THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The participation and appearance of Nathan Nisenbaum, attorney, at the pre-trial conference without petitioner's permission and authority was contrary to the Fourth Amendment because information divulged to the Court was illegal search and also

contrary to Indiana law. This was explored thoroughly in petitioner's brief to the United States Court of Appeals for the Seventh Circuit and with appropriate authorities cited therein.

PETITIONER WAS DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS AS REQUIRED UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The appearance of Nathan Nisenbaum, attorney, in addition to being a contravention of the Fourth Amendment also was a denial of procedural and substantive due process under the Fifth Amendment because he appeared at the pre-trial conference without the authority of the petitioner, and he was allowed to participate in the pre-trial conference without filing an appearance. The United States Supreme Court is the final arbiter of due process under the Constitution as explicated in Gallagher v. Quinn, 363 F. 2d 301, 124 U.S. App. D.C. 172, cert. denied 385 U.S. 881. Under mandate of due process clause a person cannot be judicially deprived of his life, liberty, or property except by a tribunal which is able to consider it solely upon its merits under the law; United States ex. rel. Leguillon v. Davis,

(D.C. Virgin Islands 1953) 115 F. Supp. 392, reversed on other grounds 212 F. 2d 681. Due process of law requires not only opportunity for presentation of evidence to cross examination of witnesses but also for opportunity for argument; L. B. Wilson Inc. v. Federal Communications Commission, 170 F. 2d 793, 83 U.S. App. D.C. 176 (1948). The fundamental concept of due process of law is that parties to controversies are entitled to have them determined by an impartial tribunal; Lee v. Fleming, 158 F. 2d 984, cert. denied 331 U.S. 805 (1946). Litigants are entitled to trial before tribunal free from bias and prejudice; Baker v. Simmons Co. (1st Cir. 1965) 342 F. 2d 991, cert. denied 382 U.S. 820. Jurisdiction of court is purely a question of power, the power to create or affect legal interests which will be recognized as valid elsewhere, and a limit is put on this power by due process consideration; St. Clair v. Righter, (D.C. Va. 1966) 250 F. Supp. 148. The right of litigant to be heard is one of fundamental rights of due process of law; Council of Federated Organizations v. Mize, (5th Cir. 1964)

339 F. 2d 898. A trial by a biased judge is not in conformity with due process of law; National Labor Relations Board v. Ford Motor Co., 114 F. 2d 705, cert. denied 312 U.S. 689; see also Pittsburgh S.S. Co. v. N.L.R.B. (6th Cir. 1948) 167 F. 2d 126, reversed on other grounds 336 U.S. 656. Also when a hearing is had under a statute requiring a hearing, the hearing must conform to fair practices as they are known in Anglo-Saxon jurisprudence; Takeo Tadono v. Mamey (9th Cir. 1947) 160 F. 2d 665. The Fifth Amendment requires that there shall be a hearing at which each party can be heard and by virtue of which substantial enjoyment of its constitutional rights is preserved; Gordon v. Bowles, 153 F. 2d 614, cert. denied 328 U.S. 858.

Under the Fifth Amendment the basic elements of a full and fair "hearing" includes the right of each party to be apprised of all the evidence upon which a factual adjudication rests plus the right to examine, explain or rebut all such evidence; United States v. Dellman, (5th Cir. 1945) 146 F. 2d 176; and also the "hearing" necessary to meet constitu-

tional requirements of due process is a hearing of evidence and argument by one who must make the decision; Federal Trade Commission v. Scientific Living, Inc., (D.C. Pa. 1957) 150 F. Supp. 495, aff'd. 254 F. 2d 598, cert. denied 349 U.S. 968. Due process requires that a person shall have an opportunity to be heard by a court of competent jurisdiction on a matter which affects his interest; United States v. Dollar, (D.C. Cal. 1951) 100 F. Supp. 861, cert. denied 342 U.S. 910. It can also be inferred that there was obstruction of justice under Title 18 U.S.C.A. Section 1503.

The foregoing argument and citations are applicable to the United States District Court proceeding as well as the United States Court of Appeals order dismissing the cases and will be discussed in the Appellate Court arguments as to the non-granting of a hearing, infra.

PETITIONER WAS DENIED A JURY TRIAL AS REQUIRED UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION AND RULES 38 AND 39 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The question of denial of trial by jury was raised in petitioner's appellate brief. It was

It was alleged in the foregoing brief, and is sustained by the record, that petitioner's original and amended complaint contained a request for an injunction which was never ruled or acted upon by the Court. In addition the demand for trial by jury by petitioner was made before joining of issue. The demand was not withdrawn as required under Rule 38(b) of the Federal Rules. Also where legal claim for which right to jury trial is preserved by the Constitution is joined with equitable claim (request for injunction) for which no right of trial by jury exists right to trial by jury on factual issues tendered by legal claim must be preserved; Wirtz v. Robert E. Adair Inc., (D.C. Ark. 1963) 224 F. Supp. 756. In addition where complaint sets forth two counts, the first seeking purely legal relief, and the second seeking both legal and equitable relief, issues raised by the second count are to be tried by jury.

THE LOWER COURT FAILED TO OBSERVE THE FEDERAL RULES OF CIVIL PROCEDURE IN ITS PROCEEDINGS

Petitioner alleges that he was entitled to written notice of attorney Nisenbaum's appearance under Rule 5 of the Federal Rules of Civil Procedure.

Where plaintiff's notice of withdrawal with court clerk without service on defendant terminated case, and defendant was not entitled to have case assigned for him; Silver v. Indemnity Ins. Co. of North America, (D.C. Conn. 1948) 80 F. Supp. 541; likewise a motion of defendant to dismiss and in the alternative for summary judgment, is to be granted or denied of its own force, and a formal demand by motion of plaintiff for denial or striking of defendant's motion is neither required or appropriate; Weicher v. United States, (D.C. Ark. 1953) 14 F.R.D. 235. Cf. with defendant's motion for summary judgment in both cases, wherein the Court failed to act on either one without a hearing with reference to respondents' motions for summary judgment.

In addition under Rule 5 of the Federal Rules of Civil Procedure and Rule 1 of the United States District Court for Southern Indiana, there was no appearance by petitioner's previous counsel, Mr. Nisenbaum, who appeared at the pre-trial conference without authorization. A change of address letter mailed by a defendant to clerk of the court by

defendant who had not otherwise appeared in an action following notification by the clerk of the trial date was not an appearance. An "appearance" is ordinarily an overt act by which a party comes into court and submits himself to its jurisdiction; it is an affirmative act requiring knowledge of the suit and intention to appear; Anderson v. Taylorcraft, Inc., (D.C. Pa. 1961) 197 F. Supp. 872.

Rule 7(b) of the Federal Rules provides that unless there is a hearing or trial all motions shall be in writing. Petitioner's motion to dismiss was not in writing at the pre-trial conference. The purpose of this particular subdivision (b) of this rule providing that application to court for order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth relief or order sought, is to give a simple and elastic procedure without too much emphasis on form; Runghley v. Pennsylvania R.C. (3rd Cir. 1956) 230 F. 2d 387. In addition under Rule 8 of the foregoing rules, construction of the pleadings should

be liberally construed; Beacon Theatres, Inc. v. Westoar, (9th Cir. 1959) 359 U.S. 500. Under Rule 11 of the Federal Rules there was a failure to sign the motion by petitioner and a case that is particularly in point was where on morning that motion of defendants to compel deponents to answer questions was referred to court, court was orally advised by plaintiff's attorney that counsel for deponents wished to adjourn hearing on motion to unspecified date, and no prior notice had been given either court or defendants, such informal request could not be considered a motion, and even if it could be, failure to put it in writing signed by counsel would preclude court from granting desired relief; Shapiro v. Freeman, (D.C. N. Y. 1965) 38 F.R.D. 308. Cf. with petitioner's oral motion to dismiss contrary to Rule 41 of the Federal Rules of Civil Procedure which must be by stipulation of all the parties, and in which there was no written motion.

The District Court failed to limit the purpose of Rule 16 of the Federal Rules of Civil Procedure wherein it is often stated that pre-trial practice

is to define the claims and defenses of the parties for the purpose of eliminating unnecessary proof and issues, lessening the opportunities for surprise and thereby expediting trial; Rosden v. Leuthold, (D.C. Cir. 1960) 274 F. 2d 747. Also the purpose of a pre-trial conference is to sift the discovered and discoverable facts to determine the triable issues both factual and legal and to chart the course of the lawsuit accordingly; Lynch v. Call, (10th Cir. 1958) 261 F. 2d 130. It was stated in Irving Trust Co. v. United States, (3rd Cir. 1955) 221 F. 2d 303, cert. denied 350 U.S. 828 that it is the purpose of a pre-trial conference to simplify the issues, shape up the testimonial and documentary evidence and generally clear the decks for trial.

An indication of the function of the pre-trial conference was stated in Burton v. Weyerhauser Timber Co., (D.C. Or. 1941) 1 F.R.D. 571 that pre-trial orders should be agreed on by counsel and presented to the court for signature and filing a reasonable time before trial, and where counsel are unable to agree on the form of the pre-trial

order, the court should be advised well before the trial date and pre-trial orders representing the views of both sides should be submitted. Also if, during the pre-trial conferenc, attorney who was asked to make an admission is possessed of the information or record requisite for such an affirmative answer, and is willing to make such admission when made, is preserved in the conference report; Tobin v. Chambers Const. Co., (D.C. Neb. 1952) 106 F. Supp. 473. As noted in the foregoing cases, supra, the function of the pre-trial conference is to set the issues and the case for trial on the merits. In petitioner's case it was used as vehicle to get the cases dismissed over his objections as to his mental ability and competence. Where a federaal district court believed that plaintiff had not properly complied with pre-trial order to furnish factual information to defendants, but district court did not regard plaintiff's response to order for further information as sufficiently contumacious in and of itself to justify dismissal, preclusion order was an ample penalty for lack of cooperation

on plaintiff's part and dismissal of complaint was improper; Syracuse Broadcasting Corp. v. Newhouse, (2nd Cir. 1959) 271 F. 2d 910. Petitioner also submits that there was no record of the pre-trial conference taken by the Court. In a case where such a record was taken it was decided that where there was a record taken of a pre-trial conference, there was no error of trial court overruling motion for new trial alleging deprivation of rights assertedly resulting from case's having been called for trial and judgment having been entered against them without prior notice, could warrant reversal where they no where indicated defense or prejudice. Cf. with petitioner's case where there was a motion for Judge Dillin's recusation and where a person hostile to petitioner, namely, Mr. Nisenbaum, was allowed to be present at the pre-trial conference contrary to Indiana State Law; York v. United States, (5th Cir. 1961) 289 F. 2d 310.

Petitioner submits that Rule 35 of the Federal Rules of Civil Procedure provides for the physical and mental examination only when the foregoing con-

ditions are in controversy, and which the Court in petitioner's case required as condition precedent to petitioner's going to trial. His mental condition was not mentioned in the complaint. Sweeping mental or physical examinations of a party who has not affirmatively put into issue his own mental or physical condition should not be automatically ordered merely because the person has been involved in an accident and a general charge of negligence is alleged; Schlegenhauf v. Holder (7th Cir. 1964) 379 U.S. 104.

Both of the cases herein involved had motions for summary judgment pending before the Court which were not ruled upon by the Court. In the mandamus action the motion was made in 1968 and in the regular case of Neagle et al, attorney for Indiana Bell Telephone Company Incorporated filed a motion for a summary judgment the day of the pre-trial conference. See statement of the case. In a motion for summary judgment, Rule 56 of the Federal Rules of Civil Procedure states that there must be a hearing within ten days of the motion. Also when there is a defen-

dant's motion for summary judgment, allegations of complaint must be taken as true and unless it appears with absolute certainty that plaintiff is not entitled upon any theory, the request for summary judgment must be denied; Smart v. United States, (D.C. Okl. 1953) 111 F. Supp. 907, aff'd. 207 F. 2d 841. It was stated in Brunswick Corp. v. Vineberg (5th Cir. 1967) 370 F. 2d 605 that summary judgment is lethal weapon and courts mindful of its aims and targets and should beware of overkill in its use. Petitioner submits that the Court did not have authority to dismiss the cases because there were motions for summary judgment in both cases and that a hearing should have been held on both motions before the cases were dismissed.

THE DISTRICT COURT DID NOT RULE ON PETITIONER'S MOTION FOR RECUSATION BEFORE THE PRE-TRIAL CONFERENCE

Petitioner's argument with regard the statute involved, namely, Title 28 U.S.C.A. Section 144, is fully explicated and explored in his brief to the United States Court of Appeals for the Seventh Circuit. Petitioner's motion for recusation was never ruled upon by the Court although the statute expli-

citly states that the court should stop any further proceedings when there is such a motion by a party properly filed and based on bias and prejudice.

ERIE TOMPKINS DOCTRINE--INDIANA STATUTES

The Indiana statutes as delineated in petitioner's brief to the United States Court of Appeals for the Seventh Circuit embodies petitioner's argument as to the violations of Indiana Statutes which establish negligence per se or negligence in law. The Indiana rule is that when there is a violation of a statute or ordinance and a tort has been committed, which in the subject case is invasion of privacy or its subsidiary principle, defamation, there is negligence per se or negligence in law. Under the Erie Tompkins doctrine the federal courts use the substantive law of the state in which it is located, i.e., locus delicti which in the subject cases is in Indiana. Supporting petitioner's argument in his brief are Indiana cases germane to the issue of defamation. Petitioner also raised the issue of civil conspiracy in his brief to the Appellate Court.

An issue that was touched upon in petitioner's

brief was that of the involvement of another governmental agency, namely, the Wage & Hour Division of the United States Department of Labor. The Court might well speculate on why petitioner alleges defam ation by the foregoing agency. Ratio est legis anima; reason is the soul of the law. Petitioner had pursued an honorable career in government for 21½ years and because he complained about religious discrimination, he was involuntarily retired. The only inference that can be drawn from the harassment of agents of the Federal Bureau of Investigation to petitioner was that a high ranking employee of the foregoing government agency, namely, the Wage & Hour Division, had apparently lodged a complaint as a "faceless accuser" that petitioner was a communist. The harassment started in Jamuary 1964 which was stated in petitioner's original complaint in the lower court and the date of his retirement. A confirmation of this allegation was substantiated when petitioner was called as a deponent in a former Wage-Hour case, in which the deposition was never filed or signed as required under Rule 30 of the Federal Rules of Civil

Procedure and which was defamatory in that it impugned the honesty and integrity as well as impeaching the credibility of petitioner with regard to a case he had pending in the Unites States Court of Claims for illegal discharge. The entire circumstances surrounding the foregoing defamation is stated and supported by petitioner's evidence in his appellate brief, namely, the copy of the subpoena duces tecum and a certification as to the authenticity of entries proving that the deposi- was never signed by petitioner or filed in the United States District Court for the Southern District of Indiana as required by the foregoing rule.

THE ORDER OF THE APPELLATE COURT DISMISSING THE APPEAL ON MOTION OF APPELLEES WITHOUT A HEARING IS IN CONFLICT WITH THE DIFFERENT CIRCUITS

As a preface to this argument of the petition it is submitted by petitioner that the Fifth Amendment to the Constitution of the United States is applicable to the Appellate Court's action in dismissing petitioner's appeal without a hearing on his objection thereto.

The denial of due process as delineated under the Fifth Amendment was argued in the petition, ante, in the lower Court's action, and the nexus to such denial is clearly ascertainable in authorities

cited. In the citations listed on the denial of due process, petitioner asserts that the different circuits have held contrary to the United States Court of Appeals for the Seventh Circuit in which a hearing was denied.

It was submitted in petitioner's motion to set aside and be granted a hearing in the Appellate Court that the Court exceeded its jurisdictional power under Title 28 U.S.C.A. Section 1291 in denying petitioner a hearing. Petitioner asserts that under the principle of the law governing jurisdiction that the Court of Appeals for the District of Columbia could look to decisions of other courts as petitioner is doing in Ammerman v. City Stores Co., (D.C. Cir. 1968) 394 F. 2d 950, 129 U.S. App. D.D. 325. Also as indicated in the foregoing motion, an appeal from judgment of a federal district court is a matter of right; Brewen v. United States, (5th Cir. 1967) 375 F. 2d. 285. There was a final decision in the district court and where the appeals court in the form of an order dismissed both of petitioner's cases, the concept of finality was enunciated in

Bohms v. Gardner, (8th Cir. 1967) cert. denied 390 U.S. 964 and therefore the matter came before the Appellate Court which was within the Court's jurisdiction. Also the rules governing jurisdiction of federal courts of appeals protect not only litigants but the courts themselves; American Express Warehousing Limited v. Transamerican Ins. Co. (2nd Cir. 1967) 380 F. 2d 277.

Based on the record petitioner submits that there is ample reason for his appeal which should not have been dismissed by the Appellate Court without a hearing. It was stated in Brookins v. United States, (5th Cir. 1968) 397 F. 2d 261, cert. denied 393 U.S. 952 that a Court of Appeals can only take the record as it finds it, cannot add to or go behind, beyond, or outside it and will not prosecute an independent inquiry.

Under this statute regarding jurisdiction (Title 28 U.S.C.A. Section 1291) petitioner submits that the lower court's dismissal of his cases was erroneous. Under the heading of scope of review of the Appellate Court, it is to determine whether

the trial court's decision was clearly erroneous in regard to inferences reflected in its fact findings or rested on unsound doctrine so far as legal rulings are concerned; Gary v. Dane, (D.C. Cir. 1969) 411 F. 2d 711. Cf. petitioner's situation both in the lower court and the United States Court of Appeals for the Seventh Circuit.

In an action which was dismissed without any answer having been filed, any issue of fact having been raised or tried, and without any evidence having been taken, on appeal court would accept allegations of fact in complaint as true; Hells v. Eisenhart, 256 F. 2d 609, cert. denied 358 U.S. 832, rehearing denied 358 U.S. 914. Cf. petitioner's situation wherein both cases in the lower court and appellate court were dismissed without a hearing and contrary to Rule 41 under voluntary dismissal of the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure Rule 31. Concomitant with the foregoing citation, petitioner submits that Rules 1, 3, 4, 33, 34, of the Federal Rules of Appellate Procedure and Circuit Rule 4 of the United States Court of Appeals

for the Seventh Circuit were contravened.

Petitioner submits that the dismissal of the subject cases in the lower court and the appellate court were in effect involuntary. Based on the foregoing premise, upon plaintiff's appeal from judgment entered at close of plaintiff's case-in-chief, (cf. petitioner was not the recipient of right to present his case) plaintiff is entitled to every benefit of every inference which can reasonably be drawn from evidence viewed in light most favorable to claim or cause of action asserted; Federal Rules of Civil Procedure rules 41(b), 50 U.S.C.A., Kingston v. McGrath (9th Cir.) 232 F. 2d 495; and where a judgment dismissing action was rendered without a hearing on facts, reviewing court would take plaintiff's allegations as true for purpose of appeal; Frank Meshada Co Allegheny County (3rd Cir.) 256 F. 2d 241, cert. granted 358 U.S. 872; and in the Fourth Circuit upon appeal from granting of a motion for judgment of involuntary dismissal, at conclusion of plaintiff's evidence, Court of Appeals must review the evidence and reasonable inferences

to be drawn therefrom in the light most favorable to the plaintiff; Bowling v. Lewis (4th Cir.) 261 F. 2d 311. Also on appeal from judgment dismissing actions, Court of Appeals would assume that allegations of complaint were true; Nelson v. Westland Oil Co. (8th Cir. 1950) 181 F. 2d 371. Petitioner submits that because the procedures as outlined by voluntary dismissal under Rule 41 of the Federal Rules of Civil Procedure that Rule 41(b) would be applicable as involuntary dismissal, and that therefore the foregoing reasoning and citations listed, supra, would be applicable to the dismissal of the subject cases. In addition it is also asserted that since there were two motions for summary judgment involving the mandamus action and the defamation action, i.e., invasion of privacy that a fortiori the cases should have been subjected to a hearing and that the court should have given petitioner his "day in court".

In summarizing this part of petitioner's argument it is easily ascertainable that the various circuits listed in the foregoing citations indicate wide divergence from the United States Court of

Appeals for the Seventh Circuit's order dismissing the cases without a hearing. As recently as July 9, 1970, the United States Court of Appeals for the District of Columbia Circuit in case No. 23,627 which has not yet appeared in official reports, involving John E. Moss et al, petitioners, v. Civil Aeronautics Board, respondent, in a petition for review of orders of the Civil Aeronautics Board reversed an order of the Board granting a 6% increase in fares to the airline intervenors in the foregoing action because the Board determined rates without proper notice and hearings as required by statute. The foregoing case is distinguished by petititioner's situation in that this involved a rate-making procedure, rather than a case at issue on the merits. However, it can be compared to petitioner's cases in that there was an oral argument allowed which petitioner was not allowed. The Court cites procedures and standards set by statute. Compare with the requirements of the Federal Rules of Civil and Appellate Procedure in which a hearing is required in both courts (due process, ante,) and

which both of the foregoing courts deviated substantially from the notice and procedures as delineated by the foregoing rules.

THE UNITED STATES SUPREME COURT HAS POWER TO GRANT CERTIORARI WHERE THERE IS DEVIATION FROM STANDARDS AS DELINEATED IN THE RULES OF THE DISTRICT COURT AND THE APPELLATE COURT PARTICULARLY WHEN SUCH DEVIATION IS IN CONFLICT WITH THE VARIOUS CIRCUITS

The Supreme Court, in the exercise of its general power to supervise administration of justice in federal courts had responsibility of defining fundamental requirements to be observed by Court of Appeals with respect to power vested in it regarding hearings and rehearings en banc, and to insure their observance by the respective courts; Title 28 U.S.C.A. Section 46(c); Western Pac. R. Corp. v. Western Pac. R. Co., 73 Sup. Ct. 656, 97 L. Ed. 986 (1953). (9th Cir.) While the Supreme Court decides questions of public importance, it decides them in context of meaningful litigation and its function in resolving conflicts among the various Courts of Appeals is judicial and not simply administrative or judicial; The Monrosa v. Carbon Black Export Inc., 79 S. Ct. 710, 350 U.S. 180, rehearing denied 359 U.S. 999.

With reference to the applicability of the Erie Tompkins doctrine the Supreme Court, where there was doubtful application of the foregoing doctrine, impelled it to grant certiorari; Bernhardt v. Polygraphic Co. of America, 76 S. Ct. 273, 350 U.S. 198, 100 L.Ed. 199 (1956).

In addition where the questions involved were of general importance and there was a conflict between the views of the Court of Appeals for the District of Columbia Circuit and the views of the Court of Appeals for the Second Circuit on such questions, the Supreme Court granted certiorari to review the the decisions of the District of Columbia Circuit; Federal Power Comm'n. v. Tusciora Indian Nation, 80 S. Ct. 543, 362 U.S. 99 (1960). The Supreme Court granted certiorari to review the United States Court of Appeals because that decision was contrary to decisions in other circuits; United States v. Price, 80 S. Ct. 326, 361 U.S. 304 (1960) in the Ninth Circuit. Also the Supreme Court granted certiorari because of the threat to the goal of uniformity in Hann v. Plumer, 85 S. Ct. 1136, 380 U.S. 460 (1965).

CONCLUSION

In view of the foregoing reasons and arguments and the errors in the lower courts, petitioner respectfully requests the Supreme Court to grant his petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has mailed two copies of the Petition for Writ of Certiorari to Stanley B. Miller, United States Attorney, Room 248 Federal Building, Indianapolis, Indiana, and to Richard O. Creedon, attorney, 240 N. Meridian Street, Indianapolis, Indiana, on this _____ day of September 1970.

Signed Morris I. Cohen
Morris I. Cohen

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, APRIL 21, 19 70

Before

Hon. ROGER J. KILEY, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. OTTO KERNER, Circuit Judge

MORRIS I. COHEN,
Plaintiff-Appellant,

No. 18242

vs.

JAMES T. NEAGLE, et al., and CHARLES H. BOSWELL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This matter comes before the Court on the motion of defendants-appellees to dismiss this appeal and the plaintiff-appellant's response and objections to dismissal. On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that this appeal from a judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, be and the same is hereby dismissed with costs, without prejudice to any right of plaintiff-appellant to refile his causes of action.

FPI—65—2-15-68—10M—2817

APPENDIX A

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No. 687

In the Supreme Court of the United States

OCTOBER TERM, 1970

MORRIS I. COHEN, PETITIONER

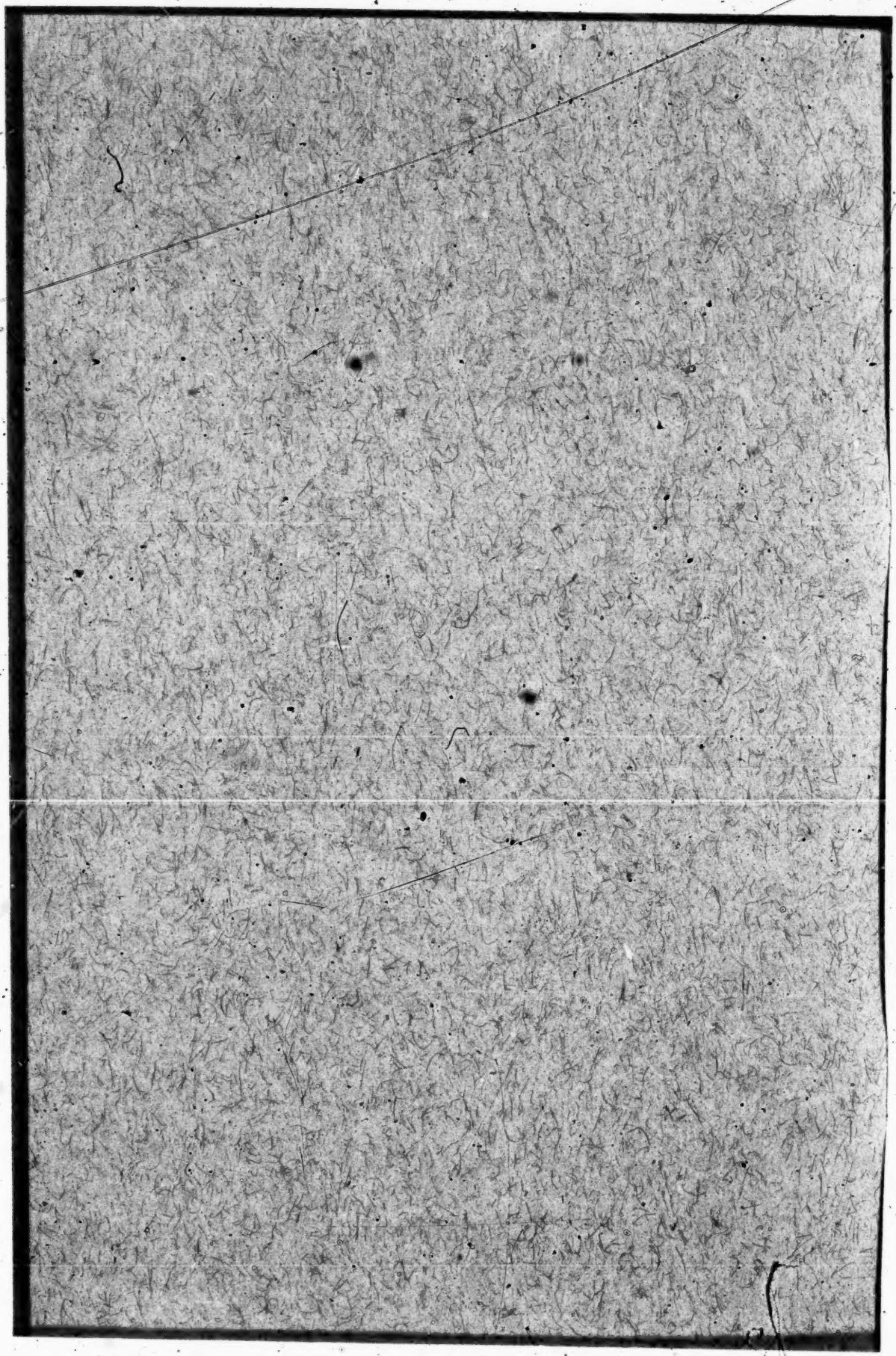
v.

JAMES T. NEAGLE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In August, 1967 petitioner, an attorney admitted to practice in Indiana, filed a complaint in the District Court for the Southern District of Indiana, against James T. Neagle, an agent in the Indianapolis office of the Federal Bureau of Investigation (FBI), alleging, *inter alia*, that FBI agents had wiretapped his telephone; that "he was followed and interfered with in three attempts at a vacation in 1965 and two times in 1966" by FBI agents; that FBI agents attempted "to contaminate food of plaintiff"; that the agents "by personal contact with members of plaintiff's family [have] turned said members against him"; that the agents have persuaded "persons of

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the opposite sex to conspire against plaintiff"; that since 1964 they have caused mail addressed to him to be diverted and lost; that they conspired with food purveyors to sell plaintiff food with harmful substances inserted in them; that they have followed plaintiff into many retail and service establishments; and that they have inserted "a chemical in plaintiff's gasoline tank and caused his insurance company to cancel his insurance on tow in service because of frequency of claims" (Complaint 1-2).

In the district court, petitioner filed an oral motion to dismiss his own complaint, which was granted (Pet. 6). Petitioner then appealed to the Court of Appeals for the Seventh Circuit from the district court's order granting his motion to dismiss. On motion of the defendant, that court, without a hearing, summarily dismissed the appeal, "without prejudice to any right of plaintiff-appellant to refile his causes of action" (Pet. App. A).

There is no occasion for review by this Court. Absent a showing of prejudice, a party who procures the dismissal of his own suit cannot appeal from such dismissal. See 5 Moore's *Federal Practice* ¶ 41.05[3] at p. 1068. Petitioner has not been prejudiced by the dismissal: he can refile his causes of action in the district court. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970